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No. 88-

Supreme Court of the United States  
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IN THE  
**Supreme Court of the United States**  
TERM, 1988

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COUNTY LINE JOINT VENTURE,

*Petitioner,*

v.

CITY OF GRAND PRAIRIE, TEXAS,

*Respondent.*

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ON PETITION FOR CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**APPENDIX TO PETITION FOR CERTIORARI**

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**APPENDIX A****IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**COUNTY LINE JOINT VENTURE** }  
vs.  
**CITY OF GRAND PRAIRIE, TEXAS** } No. CA3-86-1919-F

**ORDER**

Before the Court comes Plaintiff's Motion for Partial Summary Judgment. The motion is granted.

**I. FACTS**

Plaintiff owns a nightclub in Grand Prairie on land that the city had zoned "commercial — office." On August 31, 1976, an ordinance granting a specific use permit to sell alcoholic beverages on this land was passed and approved. The property has been used as a nightclub for about 10 years. On November 17, 1985, Plaintiff's lessee applied to the Defendant for an alcoholic beverage license. The application was denied by the City Secretary of Grand Prairie under the Defendant's Comprehensive Zoning Ordinance, Section B-713.

Plaintiff and Plaintiff's lessee thereafter appealed to the Zoning Board of Adjustments and Appeals for the City of Grand Prairie. This Board refused to hear the appeal, and gave no reason therefor.

Neither Plaintiff nor his lessee was given a hearing with respect to the termination of the specific use permit. The Defendant did not send written notice of the hearing in which the zoning change was made to any of the owners of property over which a specific use permit had been previously granted by Defendant.

## II. DUE PROCESS

Plaintiff's use of his land to sell alcoholic beverages for on-premises consumption is a significant property interest, protectable by the due process clause of the United States Constitution. *See McCulloch v. Glasgow*, 620 F.2d 47, 50 (5th Cir. 1980). When there is a protected property interest, then the right to a hearing is paramount. *Board of Regents v. Roth*, 408 U.S. 564, 569-570 (1972). In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Supreme Court announced three factors to determine whether a state procedure satisfies due process.

1. The private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Here, Plaintiff has a strong interest in seeing that it can sell alcoholic beverages on its property. Second, the Defendant, by relying on its City Secretary to determine whether the land can be used to sell alcoholic beverages and providing no hearings and no appeals ran a great risk of erroneously depriving Plaintiff of his property interest. Lastly, the government would suffer no undue fiscal or administrative burdens by enabling Plaintiff to appeal the determination to the City Secretary to the Zoning Board since that is what the Zoning Board is for.

Therefore, the Court finds that the Defendant deprived Plaintiff of his property without due process of law.

### III. CONSTITUTIONALITY OF ORDINANCES

Plaintiff next argues that the disputed ordinances violate the Texas Constitution. The Court has decided that such ordinances do violate the Texas Constitution.

Article XI, Section 5 of the Texas Constitution provides in part that:

[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State . . . . Tex. Const. art. XI, § 5.

All the disputed ordinances directly conflict with the Texas Alcoholic Beverage Code ("TABC"), because they in one way or another restrict the sale of alcohol in a way that is reserved to the TABC. *See TABC §§ 1.06, 109.31, 109.32(a)(1)* (Vernon 1978). The ordinances therefore violate the Texas Constitution. *See Royer v. Ritter*, 531 S.W.2d 448, 449 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

### IV. INVALIDITY OF ORDINANCES

Lastly, Defendant failed to provide Plaintiff with requisite statutory notice for a public hearing concerning ordinances No. 3745 and 3754. These ordinances effectively added the ordinances B-711, B-710, and B-713 to the Comprehensive Zoning Ordinance of Defendant.

Written notice to property owners affected by a zoning change is required. Tex. Rev. Civ. Stat. Ann. art. 1011f (Vernon 1963). With neither ordinance 3754 nor 3745 was written notice provided. Notice by publication is also required for zoning changes. *Id.* Again, with neither ordinance 3754 nor 3745 was proper publication notice given. With the former, nothing was published

at all. With the latter, 10 days notice was given, but 15 days notice is required. Therefore, no proper notice was given.

The Texas Supreme Court held that the Courts of this state have held ordinances and amendments to ordinances invalid where the express, mandatory provisions of the zoning statute have not been complied with. The steps directed to be taken for notice and hearing, when provided for in the law, are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power. Each act required is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed. *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962).

Therefore, the Court holds that the two ordinances, No. 3754 and 3745 are invalid.

So ORDERED this 20th day of November, 1986.

/s/ JERRY BUCHMEYER  
for ROBERT W. PORTER  
UNITED STATES DISTRICT JUDGE

**APPENDIX B****IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

COUNTY LINE JOINT VENTURE                                  }  
v.    } No. CA3-86-1919-F  
CITY OF GRAND PRAIRIE, TEXAS                            }

**ORDER**

The Court's Order granting partial summary judgment for Plaintiff is hereby vacated, because it was prematurely entered.

So ORDERED this 21st day of November, 1986.

/s/ JERRY BUCHMEYER  
UNITED STATES DISTRICT JUDGE

**APPENDIX C****IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

COUNTY LINE JOINT VENTURE                      }  
vs.    } No. CA3-86-1919-F  
CITY OF GRAND PRAIRIE, TEXAS                    }

**ORDER**

Before the Court come cross motions for summary judgment. The Court hereby denies Plaintiff's motion and grants Defendant's motion.

This dispute arises from a change in zoning ordinances.

Plaintiff seeks basically three things. First, Plaintiff wants a judgment declaring that the lack of any procedural mechanism to appeal or otherwise challenge the decision of the city secretary constitutes a denial of Plaintiff's procedural due process rights. Second, he wants a judgment declaring the ordinances unconstitutional under the Texas Constitution. Third, he wants an injunction enjoining the City from enforcing its ordinances. Plaintiff claims a denial of substantive due process (Complaint ¶ 5.5) but does not raise this in his motion for summary judgment. The questions of whether Defendant's ordinances are unconstitutional or invalid are not federal questions; these are questions of state law and the Court has pendent jurisdiction over them. *United Mine Workers v. Gibbs* 383 U.S. 715, 726 (1966).

Summary judgment is appropriate when there is no issue of material fact and it is clear that the movant is entitled to judgment as a matter of law. See Rule 56(c); *Joe Reguiera, Inc. v. American Distilling Co., Inc.*, 642 F.2d 826, 829 (5th Cir. 1981). When a motion for summary judgment is made and

supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56(e) (emphasis added).

The Court first considers Plaintiff's motion for summary judgment and first considers Plaintiff's claim that Defendant under color of law deprived Plaintiff of his procedural due process rights.

It is not clear whether a Plaintiff can state a claim for the violation of his procedural due process rights in the context of a zoning case at all. Traditionally, zoning decisions were considered legislative and therefore no Plaintiff could complain of procedural due process violations. The Fifth Circuit has said that "Our opinions repeatedly characterize local zoning decisions as 'legislative' in nature. If this word is used advisedly — as it appears to be — then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. Most of the cases developing procedural limitations on government action involve challenges to administrative decisions. The plaintiffs do not cite a single federal case that even discusses procedural requirements for zoning matters, let alone one that reverses a zoning decision because of a procedural failure." *Couf v. DeBlaker*, 652 F.2d 585, 590 (5th Cir. 1981). The Fifth Circuit held that "The only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (1974) (en banc) (emphasis added). The Court stated that such a procedural due process claim was rightfully dismissed at the district court level. *Id.*

Whether this is still the rule is uncertain. The Fifth Circuit held in another zoning case that "Even when the deprivation of a

property right triggers procedural due process standards that may require a state agency to be able to point to a rational basis employed in reaching its decision, as opposed to a basis later hypothesized by others, nothing requires proof of *the*, as distinguished from *a*, basis of decision." *Shelton v. City of College Station*, 780 F.2d 475, 484 (5th Cir. 1986) (en banc). However, the same decision holds that "whatever be the role of procedural due process here, we are persuaded, as were the district court and the panel, that [a board member's] mere membership in a church that also opposed the grant of the variances does not by itself establish bias . . ." *Id.* at 485-486. The dissent reads the majority as having admitted that procedural due process scrutiny might properly apply to a Zoning Board's decision. *Id.* at 488.

The only similar cases to handle this issue after *Shelton* do not directly consider the issue of whether a procedural due process claim can be stated in the context of a zoning decision. The Courts did decide that the procedural due process claims were without merit. In *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165 (5th Cir. 1986), the Court rejected claims of deprivation of procedural due process because the Plaintiff had had opportunities to be heard and had ignored most of them. *Id.* at 1168-1169. Another post *Shelton* decision also held that there is no procedural due process claim where the Plaintiff had an adequate opportunity to be heard. *Abraham v. City of Mandeville*, 638 F. Supp. 1108, 1113 (E.D. La. 1986). The Fifth Circuit apparently has an undeclared policy of hearing procedural due process claims on zoning decisions. Therefore, the Court will consider Plaintiff's claim that Defendant under color of law deprived Plaintiff of his procedural due process rights.<sup>1</sup>

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<sup>1</sup> This conclusion is also supported by *Schafer v. City of New Orleans*, a pre *Shelton* case, which notes that there is no procedural due process deprivation where the Plaintiffs had actual notice of the introduction of the ordinance and appeared at the hearing preceding its adoption. *Schafer v. City of New Orleans*, 743 F.2d 1086, 1089 (5th Cir. 1984). The logical corollary is that when a person

Plaintiff claims that the following are uncontested facts that support his motion for summary judgment. Plaintiff owns certain property, which has been used for at least 10 years as a night club. During the six-month period prior to the adoption of § B-713, alcoholic beverages or mixed beverages were sold at Plaintiff's property. An ordinance granting a specific use permit to sell alcoholic beverages at Plaintiff's property was passed and approved on August 31, 1976. The property is and was, at the time of termination of the specific use permit, entirely within an area zoned "Commercial — office" by the Defendant. On November 27, 1985, Jose G. Gomez (Plaintiff's lessee) applied to the City for (i) an alcoholic beverage license; (ii) a dance hall license, and, (iii) a mechanical amusement device license. On December 2, 1985, the Defendant, by and through the City Secretary, denied all three of Mr. Gomez' applications pursuant to § B-713 of Defendant's Comprehensive Zoning Ordinance (the "Ordinance.") Plaintiff was not personally notified of any hearing at which time the City Council of the Defendant was to discuss adoption of the then-proposed § B-713 of the Ordinance (relating to the termination of specific use permits) or of any hearing at which time the City Council of the Defendant was to discuss adoption of the then proposed §§ B- 710 and B-711 of the Ordinance (relating to proposed requirements to obtain a specific use permit for the on-premise sale of alcoholic beverages.

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having a valuable property right is not notified of the introduction of the ordinance and is therefore unable to attend hearings, then his procedural due process rights are violated and he may seek redress. Surprisingly, Plaintiff does not cite this case, nor does Plaintiff raise the issue of whether it was deprived of procedural due process because it was not notified of the hearing for the adoption of the ordinances. Plaintiff only mentions that it received no notice of the hearing in connection with the state law claim that the ordinances are not valid. Since the issue is not raised or briefed, this Court will not decide it. *John Deere Co. v. American Nat. Bank, Stafford*, No. 86-2830, slip op. at 2371 (5th Cir. Feb. 17, 1987).

Defendant directly controverts Plaintiff's allegedly uncontested fact that the City Secretary of Defendant denied all of Mr. Gomez' applications pursuant to § B-713. *See affidavit of Defendant City Secretary Sue Shawver.* Therefore, Plaintiff is not entitled to summary judgment on his procedural due process claim, because there is a genuine issue of material fact as to whether the Defendant's City Secretary denied Plaintiff's lessee's applications pursuant to § B-713.

The Court now turns to the Defendant's motion for summary judgment. Defendant argues that it is entitled to summary judgment on the ground that it did not violate Plaintiff's procedural due process rights.

Defendant's summary judgment evidence is as follows. The Defendant has a procedure for requesting the right to use premises which was not utilized by Plaintiff. *See affidavit of R. Clayton Hutchins, Defendant's City Attorney; affidavit of Jerry Sylo, Planning Technician of Defendant; Plaintiff's answer to Defendant's request for admission No. 2, (wherein Plaintiff admits that neither he nor his lessee has ever made application for a certificate of occupancy for the property in question).* Plaintiff has not attempted to controvert Defendant's uncontested facts by means of any summary judgment evidence as required by Rule 56(e).<sup>2</sup>

Because Plaintiff has not applied for a certificate of occupancy, Plaintiff has not complied with Ordinance B-1001, which pro-

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<sup>2</sup> In its Response to Defendant's Motion for Summary Judgment and Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment, Plaintiff alleges that it is "undisputed that because Plaintiff's specific use permit had been terminated, any request for a Certificate of Occupancy would have been futile." Plaintiff does not supply or indicate any summary judgment evidence establishing that it is undisputed that such a request would have been "futile." Quite the contrary, the Court only sees Defendant's evidence that such a request, if made in conformance with the City's ordinances, would not have been futile. Plaintiff has not attempted to controvert such evidence.

vides<sup>3</sup> that before a building may be used, it must have been inspected to see that it complies with the City's Building Code. Because Plaintiff does not comply with B-1001, plaintiff does not comply with B-700. Ordinance B-700 provides<sup>4</sup> that before a person can use property for the sale or distribution and on-premise consumption of alcohol, he must first obtain a specific use permit and that to obtain such a permit, he must also comply with all other ordinances of the City, which would logically include B-1001.

The Court does not see how the Plaintiff can complain of having been deprived of property without procedural due process when the Plaintiff hasn't even attempted to use the procedures available to him.

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<sup>3</sup> B-1001: No building hereafter erected, converted or structurally altered shall be used, occupied or changed in use and no land may be used until a Certificate of Occupancy and Compliance shall have been issued by the Building inspector of the City of Grand Prairie stating that the building or proposed use of land or building complies with the provisions of this Ordinance and other building laws of the City of Grand Prairie.

<sup>4</sup> B-700 ALCOHOLIC BEVERAGES. SALE OR DISTRIBUTION AND ON-PREMISE CONSUMPTION OF:  
ANY PERSON, FIRM OR CORPORATION THAT PROPOSES TO USE ANY PROPERTY IN THE CITY ZONED COMMERCIAL-OFFICE, COMMERCIAL, CENTRAL AREA, LIGHT INDUSTRIAL, HEAVY INDUSTRIAL, OR PLANNED DEVELOPMENT FOR THE SALE OR DISTRIBUTION AND ON-PREMISE CONSUMPTION OF ALCOHOLIC BEVERAGES SHALL BE REQUIRED TO OBTAIN SPECIFIC USE ZONING AFTER APPLICATION THEREFOR AND PUBLIC HEARING BEFORE THE PLANNING AND ZONING COMMISSION AND THE CITY COUNCIL AS OTHERWISE PROVIDED IN THE ZONING ORDINANCE OF THE CITY; PROVIDED THAT THE APPLICATION FOR SUCH LAND USE, IN ADDITION TO, BUT NOT LIMITATION OF, ANY OTHER REQUIREMENT IN SAID ZONING ORDINANCE, AS A CONDITION FOR THE SAID USAGE OF PROPERTY, COMPLY WITH ALL ORDINANCES, REGULATIONS AND CONDITIONS OF THE CITY OF GRAND PRAIRIE, AND ALL STATE AND FEDERAL LAWS AND REGULATIONS....

The Court therefore grants summary judgment for Defendant on the ground that there is no genuine issue of material fact concerning Defendant's summary judgment evidence, and the Defendant is entitled to judgment as a matter of law. *Horizon Concepts*, 789 F.2d at 1168-1169; *Abraham*, 638 F. Supp. at 1113.

Since Plaintiff's one federal claim has been dismissed, the Court declines to exercise pendent jurisdiction over Plaintiff's state claims. *Gibbs*, 383 U.S. at 726. Further, review of municipal zoning is within the domain of the states, *Shelton v. City of College Station*, 780 F.2d 475, 477 (5th Cir. 1986), and the district courts should avoid exercising pendent jurisdiction over a zoning matter *Smith v. City of Picayune*, 795 F.2d 482, 489 (5th Cir. 1986) (Higginbotham, J. concurring). Therefore, this Court dismisses the rest of the action without prejudice.

So ORDERED this 18th day of March, 1987.

/S/ ROBERT W. PORTER  
ROBERT W. PORTER  
UNITED STATES DISTRICT JUDGE

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## APPENDIX D

**County Line Joint Venture**

v.

**Grand Prairie, Tex.**

**COUNTY LINE JOINT VENTURE,**

*Plaintiff-Appellant,*

v.

**The CITY OF GRAND PRAIRIE, TEXAS,**

*Defendant-Appellee.*

No. 87-1304.

**United States Court of Appeals,  
Fifth Circuit.**

**March 18, 1988.**

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Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, BRIGHT,\* and GEE, Circuit Judges.

BRIGHT, Circuit Judge:

County Line Joint Venture (County Line) brought suit for injunctive relief and monetary damages against the City of Grand Prairie, Texas (City) on the grounds that it violated County Line's constitutional and state-created rights by applying a city zoning ordinance which automatically extinguished County Line's specific use permit (SUP) for six months of non-use. The constitutional violations allegedly committed by the City include a denial of procedural due process, substantive due process, equal protection and fifth and fourteenth amendment taking. The dis-

trict court<sup>1</sup> granted summary judgment in favor of the City on the procedural due process issue and dismissed the entire action. We affirm the district court's grant of summary judgment as to the procedural due process issue but reverse the district court's dismissal of this action and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

County Line owns certain real property located in Grand Prairie, Texas. In 1976, County Line sought and received an SUP permitting it to sell alcoholic beverages on the premises.<sup>2</sup> In February 1985, the city council passed an ordinance entitled § B-713 which automatically terminates all SUPs that are not used for a period of six months.<sup>3</sup> The City gave public notice in a

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<sup>1</sup> The Hon. Robert W. Porter, Chief United States District Judge for the Northern District of Texas.

<sup>2</sup> The city zoned the property for commercial use. However, an SUP, as an amendment to the zoning ordinance, in this case permitted the sale of alcoholic beverages where they could not otherwise be sold.

<sup>3</sup> Section B-713 provides as follows:

A. All specific use permits approved in accordance with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

B. Any specific use permit granted by the City Council shall automatically terminate if a building permit has not been obtained on the premises within one year from the date the ordinance granting the specific use permit is adopted.

C. On any tract of land for which a specific use permit has been granted and the use has ceased as of the date of this ordinance, such specific use permit shall automatically terminate six months after the adoption of this ordinance unless the use has been reinstated by that time.

D. Specific use permits in existence as of the date of this ordinance shall automatically terminate one year from the date of this ordinance if a building permit has not been obtained by that time.

Grand Prairie, Tex., Ordinances § B-713.

local newspaper that it was considering such an amendment and subsequently held a public hearing on the proposed ordinance.

On November 27, 1985, County Line's current tenant applied to the city secretary for an alcoholic beverage license, dance hall license, and a mechanical amusement device license. The city secretary checked the records to determine whether issuance of such licenses was appropriate. Her research disclosed that the property had been unoccupied for approximately one year and that pursuant to Ordinance § B-713, County Line no longer possessed an SUP. Because no license could be issued without an SUP, the secretary denied the license applications.

Following the city secretary's denial, County Line attempted to appeal the city secretary's decision regarding the SUP's termination to the zoning board of adjustments and appeals. The zoning board determined that it lacked jurisdiction to hear any complaint regarding a city secretary decision because the zoning board had jurisdiction over zoning matters which, by definition, did not include the city secretary's licensing decisions of an official of the city. County Line brought this claim for relief for violation of its civil rights and pendant state claims in United States District Court.

Both parties moved for summary judgment on the procedural due process claim. The district court granted summary judgment in favor of the City, and it apparently assumed that there were no other remaining federal claims. The district court then declined to exercise jurisdiction over the remaining pendant state law claims. With such a disposition, the district court granted a dismissal of the action. County Line then brought the present appeal.

We now turn to County Line's claim that its constitutional rights have been violated by the City of Grand Prairie.

## II. DISCUSSION

### A. Procedural Due Process

In an attempt to delineate the relationship between property owners' rights and zoning ordinances, courts and commentators indicate that the existence of procedural due process rights depends upon how the court views zoning ordinances and decisions. D. Mandelker, J. Gerand & E. Sullivan, *Federal Land Use Law*, § 2.03 (1986); *Developments in the Law — Zoning*, 91 Harv.L.Rev. 1427 (1978). The City asserts that this court should view the City's conduct in adopting and applying § B-713 as a legislative act.

[1] Generally, if the court views the governmental conduct as legislative, the property owner has no procedural due process rights. "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process — the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." 2 R. Rotunda, J. Nowak & J. Young, *Treatises on Constitutional Law; Substance and Procedure*, § 17.8, p. 251 (1986). The large number of people affected by the legislative process ensures that the legislature will act reasonably. *Rogin v. Bensalem Township*, 616 F.2d 680, 693-94 (3d Cir. 1980), cert. denied, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981).

County Line urges this court to view the ordinance and its application under an administrative/adjudicative model. County Line argues that it has a protectable property interest in the SUP and that the City violated its right to procedural due process when the City considered and enacted the statute without giving County Line personal notice. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Further, County Line argues that the City violated County Line's right to procedural due process when the City failed to give County Line personal

notice and a hearing prior to the time the ordinance operated to extinguish its SUP. County Line also contends that the City violated its due process rights when the city secretary denied the requested licenses because County Line did not have the proper zoning.

[2] If the action of the city council is viewed as administrative/adjudicative, procedural due process rights may attach. These procedural rights follow only if the landowner establishes a property right created by state or local law. The amount of process due depends upon the balancing of interests as enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).<sup>4</sup>

Conduct of a municipal body is likely to be deemed legislative when an elected group, such as a city council, makes a general zoning decision which applies to a large group of interests. Conversely, a municipal body's action may be more likely termed adjudicative if an appointed group, such as a zoning board, makes a specific decision regarding a specific piece of property. See *Developments, supra*.

As a preliminary matter to resolving whether the city council acted in an administrative or legislative capacity in enacting the ordinance, we review this court's decisions in *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 416 U.S. 901, 94 S.Ct. 1625, 40 L.Ed.2d 119, *cert. denied*, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974); *Couf v. DeBlaker*,

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<sup>4</sup> The court in *Mathews* identified three interests which must be balanced. Those factors are as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S at 335, 96 S.Ct. at 903.

652 F.2d 585 (5th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982); and *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (*en banc*), *cert. denied*, — U.S. —, 106 S.Ct. 3276, 91 L.Ed.2d 566, *cert. denied*, — U.S. —, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986).

In *Pruitt*, the plaintiffs/appellants owned land zoned partially for residential use and partially for commercial use. The landowners sought to have the property rezoned to accommodate apartments. The local planning commission recommended the change, but the county commissioners denied the request. The landowners asserted that the county commissioners violated the owners' rights to equal protection and due process of law when the commission, according to the owners, failed to explain the basis for its decision. The court, *en banc*, held that "local zoning is a quasi-legislative procedure, not subject to federal juridical consideration in the absence of arbitrary action." 491 F.2d at 7. The court went on to hold that this view is applicable to the adoption of comprehensive zoning plans as well as the reclassification of a particular piece of property.

Thus, *Pruitt* expresses the viewpoint that a zoning decision, made by an elected body such as a county commission, should be deemed legislative, not administrative.

In *Couf*, a developer purchased waterfront property with the intent of building condominiums. At the time of purchase, the zoning permitted the desired building. However, by the time the developer finally applied for a building permit, the city commission instructed the planning commission that all property on the waterfront, including the developer's property, be "down zoned," and the planning commission should refuse to accept applications for building permits. The developer asserted that he was deprived of his property without due process of law.

The court determined that *Pruitt* controlled the disposition of the procedural due process claim. The court stated, as follows:

Our opinions repeatedly characterize local zoning decisions as "legislative" in nature. (Citations omitted.) If this word is used advisedly — as it appears to be — then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. (Citations omitted.)

652 F.2d at 590. Again, this court reaffirmed its view that zoning decisions, at least those made by elected bodies, are legislative, thus no procedural due process rights apply.

In *Shelton*, the landowner sought a variance for the parking requirements which would be enforced if the landowner changed the type of business conducted on the premises. 780 F.2d at 477. All three attempts to convince the city zoning board to grant the variance failed. The landowner then brought suit, claiming a violation of substantive and procedural due process. The en banc court in *Shelton* not only reaffirmed the view that the procedural aspect of zoning decisions are viewed under the legislative model but also considered, at great length, whether a claim of substantive due process violation should be viewed under the legislative or administrative model. The court flatly rejected the administrative model in favor of the legislative model.

The dissent in *Shelton* took issue with the majority's conclusion that a zoning board of adjustment, as an appointed body with limited power, could be cloaked with the deference given to legislative actions. The dissent contended that an appointed body making specific decisions regarding specific property ought to be held to a higher standard. See 780 F.2d at 488 (Rubin & Tate, J.J., dissenting).

Although we recognize that circumstances may arise in which the zoning decision of a governmental body, such as a county commission or a city council, may require some procedural due process, the circumstances presented in this case do not call for such a ruling.

[3] The enactment of the ordinance was a result of a purely legislative act by the city council of Grand Prairie, an elected body which wields broad power to make a decision in the area of city planning and zoning. The ordinance in question applies generally to all SUPs in existence and those thereafter created. County Line presented no evidence that the city council aimed the ordinance specifically at County Line rather than calling for termination of all SUPs which had suffered non-use for a period of at least six months. Because the city council possesses extensive legislative powers and had enacted an ordinance general in scope, we must apply the legislative model to the ordinance here in question and reject County Line's argument that it has a cognizable claim for relief for violation of procedural due process.

[4] County Line's alternative argument — that the action by the city secretary deprived it of procedural due process — lacks any merit. The city secretary possessed no power to make zoning decisions. Thus, her decision had no effect on the existence or non-existence of the SUP. Indeed, the city secretary's decision could very well have been wrong.

This case has similarities to the circumstances revealed in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). In *Texaco*, owners of severed mineral interests appealed the application of an Indiana statute which automatically extinguished a mineral interest if not used for a period of twenty years.<sup>5</sup> The statute did not provide for notice to the owner of the mineral estate prior to the lapse, but it did provide that the

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<sup>5</sup> The Indiana statute, known as the Mineral Lapse Act, Ind. Code §§ 32-5-11-1 to 8 (1976), provides that the owner of the mineral interest who fails to use the interest for a period of twenty years automatically loses the interest, with the interest reverting back to the surface owner. A use of the interest includes the actual or attempted production of minerals, or the paying of taxes or royalties. The owner could also prevent a lapse if the owner files a statement of claim with the local recorder of deeds.

surface owner may give notice to the mineral owner subsequent to the lapse.

The mineral interest owners argued a denial of procedural due process, first because the state failed to notify them of the requirements of the new law, and second because the statute did not require the surface owner to give notice prior to the lapse. The Supreme Court found no merit in either argument.

The Court rejected the argument that the mineral owner should have been given notice of the requirements of the new law even though the owner establishes a property interest. The Court stated that “[i]t is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.”<sup>6</sup> *Id.* at 532, 102 S.Ct. at 793 (citing *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925)).

After holding that the mineral interest owners were presumed to know the contents of the lapse statute, the Court addressed the issue of whether, given that knowledge, the owners were entitled

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<sup>6</sup> The Court in *Texaco* also stated that “a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.” 454 U.S. at 532, 102 S.Ct. at 793. The Court found that the two-year grace period, which allowed a mineral interest owner to protect an interest which would otherwise lapse upon the effective date of the statute, foreclosed any argument that the mineral interest owners did not have a reasonable opportunity to familiarize themselves with the law. In this case, the City did not provide a grace period. Rather, non-use for a six-month period after the effective date of the ordinance resulted in automatic extinguishment of the SUP. In light of the interest involved in this case, an SUP, compared with the interest involved in *Texaco*, a fee in the mineral interest, we determine that the six-month period in which County Line should have informed itself of the ordinance to be reasonable, particularly because the City gave public notice of its consideration and subsequent adoption of the ordinance. See *id.* (courts should show great deference to legislative judgment regarding adequacy of grace period).

to a pre-lapse notice from the surface owners. *Id.* 454 U.S., at 533, 102 S.Ct. at 794. The Court, after noting the difference between a self-executing statute and a subsequent judicial determination of a lapse, determined that the mineral interest owner is not entitled to notice of the application of the self-executing statute. In doing so, the Court held that the notice requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), were inapplicable. As the Court in *Texaco* stated:

The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property.

454 U.S. at 535, 102 S.Ct. at 795 (footnote omitted).<sup>7</sup>

County Line may have rights flowing from existing administrative remedies. Before opening for business, County Line must obtain a certificate of occupancy. Grand Prairie, Tex., Ordinances § B-1001. To obtain a certificate, the premises must be properly zoned. *See id.* If the City denies County Line's application for failure to have proper zoning (no SUP), the denial could be

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<sup>7</sup> The Court similarly rejected the owners' argument that they were entitled to specific notice and hearing based on *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (notice and hearing before driver's license suspension); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (notice and hearing before pre-judgment replevin order); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (notice and hearing before termination of service by public utility). The Court noted that the above cases are different because, in those cases, the interests were "taken only after a specific determination that the deprivation was proper." 454 U.S. at 537, 102 S.Ct. at 796 (footnote omitted).

appealed to the zoning board of adjustment and appeals. In this way, the zoning board would have the jurisdiction and opportunity to hear the issue of the SUP extinguishment. If County Line obtained no relief from the zoning board, it could appeal the matter in state court. In this way, the decision of the zoning board and that of the courts are "to be accorded finality" and at these stages, we presume County Line will be given an opportunity to be heard. *See Texaco*, 454 U.S. at 535, 102 S.Ct. at 795.

#### B. Other Federal Claims

From a review of the pleadings we determine that, in addition to its procedural due process claim, County Line asserts that the ordinance violates County Line's rights to substantive due process and equal protection by being arbitrary and capricious and further that the termination constitutes an improper taking under the fifth and fourteenth amendments. County Line also asserts pendant state law violations. Both parties moved for summary judgment on the issues of procedural due process and state law violations. The district court's opinion did not address the other federal claims asserted by County Line. Thus, the claims are still pending before the district court. We observe that the district court may stay consideration of additional claims pending exhaustion by County Line of its administrative remedies, if any, or the district court may proceed to resolve these remaining matters.

### III. CONCLUSION

Accordingly, we affirm the district court's grant of summary judgment for the City on the procedural due process issue. We remand the case for further consideration of the other federal claims and state claims pending any further administrative proceedings initiated by the appellant. **AFFIRMED IN PART AND REMANDED.**

## APPENDIX E

### IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 87-1304

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County Line Joint Venture,

*Plaintiff-Appellant,*

versus

CITY OF GRAND PRAIRIE, TEXAS,

*Defendant-Appellee.*

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Appeal from the United States District Court for the  
Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION  
FOR REHEARING EN BANC

(Opinion 03/18/88, 5 Cir., 198, F.2d      )  
(April 19, 1988)

Before CLARK, Chief Judge, GEE and BRIGHT\*, Circuit  
Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK  
CHIEF JUDGE

\* Senior judge from the 8th Circuit Court of Appeals, sitting by designation.

**APPENDIX F****ORDINANCE No. 2750**

AN ORDINANCE AMENDING THE ZONING MAP AND ORDINANCE SHOWING THE LOCATION, BOUNDARY AND USE OF CERTAIN PROPERTY BY THE GRANTING OF A SPECIFIC USE PERMIT FOR ON-SITE USE OF ALCOHOLIC BEVERAGES AT 2515-H WEST JEFFERSON, TO WIT: TRACT 6-I OUT OF THE TAPLEY HOLLAND SURVEY, ABSTRACT 750 TARRANT COUNTY, TEXAS; SAID ZONING MAP AND ORDINANCE PASSED ON JANUARY 27, 1971, AND RECORDED IN BOOK 8, PAGES 405 TO 509 OF THE ORDINANCE RECORDS OF THE CITY OF GRAND PRAIRIE, TEXAS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; CONTAINING A SAVINGS CLAUSE; AND TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

WHEREAS, the owners of the property described hereinbelow filed application with the City of Grand Prairie, Texas, petitioning an Amendment of the Zoning Ordinance and Map of said City so as to obtain a specific use permit to allow on-site use of alcoholic beverages at 2515-H West Jefferson on said property which is presently zoned Commercial Office; and

WHEREAS, the Planning and Zoning Commission of Grand Prairie, Texas, held a public hearing on said application on August 23, 1976 after written notice of such public hearing before the Planning and Zoning Commission on the proposed specific use permit for on-site use of alcoholic beverages at 2515-H West Jefferson had been sent to owners of real property lying within 200 feet of the property on which the specific use permit for on-site use of alcoholic beverages at 2515-H West Jefferson is proposed, said Notice having been given not less than ten (10)

days before the date set for hearing to all such owners who rendered their said property for City taxes as the ownership appears on the last approved City Tax Roll, and such Notice being served by depositing the same, properly addressed and postage paid, in the City Post Office; and

WHEREAS, after consideration of said application, the Planning and Zoning Commission of the City of Grand Prairie, Texas voted unanimously to recommend to the City Council of Grand Prairie, Texas, that a specific use permit be granted to allow on-site use of alcoholic beverages at 2515-H West Jefferson on said property; and

WHEREAS, Notice was given of a further public hearing to be held by the City Council of the City of Grand Prairie, Texas, in the City Hall Plaza Building at 7:30 o'clock P.M. on August 31, 1976, to consider the advisability of amending the Zoning Ordinance and Map as recommended by the Planning and Zoning Commission, and all citizens and parties at interest were notified that they would have an opportunity to be heard, such Notice of the time and place of such hearing having been given at least fifteen (15) days prior to such hearing by publication in the Grand Prairie Daily News, Grand Prairie, Texas, a newspaper of general circulation in such municipality; and

WHEREAS, all citizens and parties at interest have been given an opportunity to be heard on all the matter of the proposed specific use permit and the City Council of the City of Grand Prairie, Texas, being informed as to the location and nature of the specific use proposed on said property, as well as the nature and usability of surrounding property, have found and determined that the property in question, as well as other property within the city limits of the City of Grand Prairie, Texas, has changed in character since the enactment of the original Zoning Ordinance to the extent that a specific use may be made of said property as herein provided and by reason of changed conditions, does con-

sider and find that this amendatory Ordinance should be enacted since its provisions are in the public interest and will promote the health, safety and welfare of the community.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

I.

That the Zoning Ordinance and Map of the City of Grand Prairie, Texas, showing the locations and boundaries of certain districts, and said Zoning Ordinance and Map having been made a part of an Ordinance entitled:

"AN ORDINANCE AMENDING IN ITS ENTIRETY CHAPTER 36 OF THE CODE OF ORDINANCES KNOWN AS THE ZONING ORDINANCE OF THE CITY OF GRAND PRAIRIE, TEXAS, AS PASSED AND APPROVED BY THE CITY COUNCIL ON THE 27TH DAY OF JANUARY, 1971. TOGETHER WITH ALL AMENDMENTS THERETO AND ENACTING A REVISED ORDINANCE ESTABLISHING AND PROVIDING FOR ZONING REGULATIONS: CREATING USE DISTRICTS IN ACCORDANCE WITH A COMPREHENSIVE PLAN . . ."

and passed and approved January 27, 1971, recorded in Ordinance Book 8, Pages 405 to 509, inclusive, as amended, is hereby further amended so as to establish a specific use permit numbered 212 for the purpose of on-site use of alcoholic beverages at 2515-H West Jefferson on the following described area:

Tract 6-I out of the Tapley Holland Survey, Abstract 750 Tarrant County, Texas.

II.

That the following terms and conditions are hereby imposed as a part of this ordinance:

NONE

III.

It is further provided that in case a section, clause, sentence or part of this Ordinance shall be deemed or adjudged by a Court of competent jurisdiction to be invalid, then such invalidity shall not affect, impair or invalidate the remainder of this Ordinance.

IV.

All ordinances or parts of ordinances in conflict herewith are specifically repealed.

V.

That this Ordinance shall be in full force and effect from and after its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF  
THE CITY OF GRAND PRAIRIE, TEXAS, this the 31st day  
of August, 1976.

/s/ WELDON PARKHILL

Mayor, City of Grand Prairie, Texas

ATTEST:

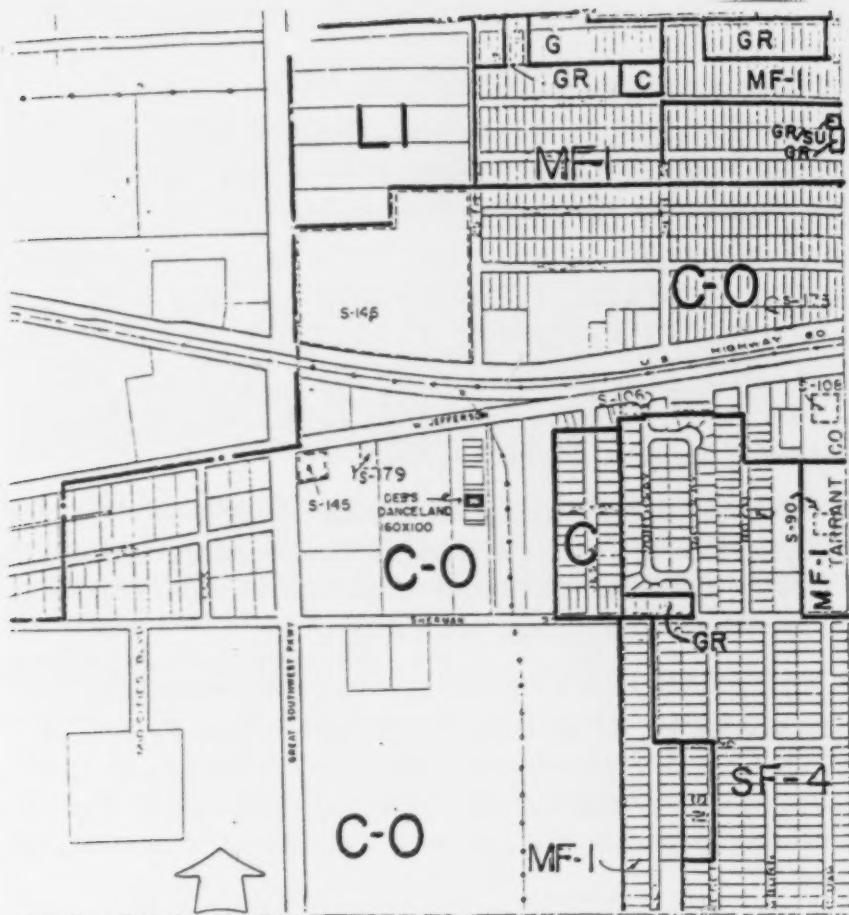
/s/ MELBA FLAGG

City Secretary

APPROVED AS TO FORM AND  
LEGALITY:

/s/ R. CLAYTON HUTCHINS

P&Z Case No. 760203



## PLANNING & ZONING COMMISSION

**CITY COUNCIL**

CASE NO. 760203

APPLICANT: DEB WOOD  
REQUEST: C-O/SU ON SITE ALCOHOLIC BEV.

**APPENDIX G****ORDINANCE NO. 3745**

AN ORDINANCE AMENDING ORDINANCE NO. 2299, BEING THE COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF GRAND PRAIRIE, TEXAS, BY ADDING THERETO A NEW SECTION B-713 PROVIDING FOR AUTOMATIC TERMINATION OF SPECIFIC USE PERMITS; CONTAINING A SAVINGS CLAUSE; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH; AND TO BECOME EFFECTIVE UPON PASSAGE, APPROVAL AND PUBLICATION.

WHEREAS, the Planning and Zoning Commission of the City of Grand Prairie, Texas, met in regular session on the 11th day of February, 1985, after publication in the Grand Prairie Daily News on the 1st day of February, 1985; and

WHEREAS, after consideration and public hearing the Planning and Zoning Commission recommended to the City Council of the City of Grand Prairie, Texas, that Ordinance No. 2299, same being the comprehensive zoning ordinance of the City, be amended to provide for automatic termination of specific use permits.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

SECTION 1: THAT Ordinance No. 2299, same being the Comprehensive Zoning Ordinance of the City of Grand Prairie, Texas, is hereby amended by adding thereto a new Section B-713 related to termination of specific use permits, which section shall read in its entirety as follows:

**"B-713. Termination of Specific Use Permits.**

A. All specific use permits approved in accordance with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

B. Any specific use permit granted by the City Council shall automatically terminate if a building permit has not been obtained on the premises within one year from the date the ordinance granting the specific use permit is adopted.

C. On any tract of land for which a specific use permit has been granted and the use has ceased as of the date of this ordinance, such specific use permit shall automatically terminate six months after the adoption of this ordinance unless the use has been reinstated by that time.

D. Specific use permits in existence as of the date of this ordinance shall automatically terminate one year from the date of this ordinance if a building permit has not been obtained by that time."

**SECTION 2:** If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

**SECTION 3:** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

**SECTION 4:** THAT this ordinance shall be in full force and effect from and after its passage, approval and publication.

PASSED AND APPROVED BY THE CITY COUNCIL OF  
THE CITY OF GRAND PRAIRIE, TEXAS, this the 19th day  
of February, 1985.

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/s/ **J. V. DEBO III**  
MAYOR, CITY OF  
GRAND PRAIRIE, TEXAS

ATTEST:

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/s/ **SUE SHAWVER**  
City Secretary

**APPENDIX H**

**CITY OF GRAND PRAIRIE  
DEPARTMENT OF COMMUNITY DEVELOPMENT  
Zoning Board of Adjustments and Appeals**

Submittal Date: 12/17/85

Fee: \$100

Received:

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PLEASE TYPE OR PRINT

**DESCRIPTION OF PROPERTY:** The following information shall be provided:

**LEGAL DESCRIPTION:**

Metes and Bounds description of subject property or Lot \_\_\_\_\_, Block \_\_\_\_\_, Addition Name: SEE EXHIBIT "A" ATTACHED HERETO

**GENERAL DESCRIPTION  
OF PROPERTY LOCATION:  
(ADDRESS)** 2515 H. W. Jefferson Blvd.  
Grand Prairie, Texas 75051

**PRESENT ZONING OF  
SUBJECT PROPERTY:** Commercial Office

**REASON FOR APPEAL:** See attached Exhibit "E"

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PLEASE TYPE OR PRINT

OWNER(S): County Line Joint Venture  
ADDRESS: 12770 Coit Road  
Suite 1009 — L.E. 54  
Dallas, Texas 75251  
PHONE#: (214) 392-9728  
APPLICANT: Jose G. Gomez  
ADDRESS: 1817 Lewis Trail  
Grand Prairie, Texas 75052  
PHONE#: (214) 601-7816

I hereby authorize Joseph G. Werner and Jane G. Allen to act in the capacity as my agent for the representation and/or presentation of this request.

Signature of Owner: \_\_\_\_\_

Agent (Please Print): Joseph G. Werner and Jane G. Allen

Signature of Agent: \_\_\_\_\_

Address of Agent: 3100 InterFirst Plaza — 901 Main Street  
Dallas, Texas 75202

Phone # of Agent: (214) 670-0597

I understand that it is necessary for me or my authorized agent to be present at the Zoning Board of Adjustments and Appeals public hearing.

Signature of Owner: \_\_\_\_\_

Printed Name: William E. Schaid, Managing Partner of  
County Line Joint Venture

Mailing Address: 12770 Coit Road  
Suite 1009 — L.B. 54  
Dallas, Texas 75251

Phone # of Owner: (214) 392-9728

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**THE FOLLOWING SHALL BE ATTACHED TO THIS  
APPLICATION:**

A Survey or plot plan of the subject property, showing the location of all structures and in a suitable submittal format as prescribed by the Department of Community Development (attached); and

A current property tax certification.

**APPLICATION FOR  
ZONING BOARD OF  
ADJUSTMENTS AND APPEALS**

**November 1985**

## THE ZONING BOARD OF ADJUSTMENTS AND APPEALS

The Zoning Board of Adjustments and Appeals shall review and act upon appeal requests for an advertised public hearing, held once each month. When the board judges that the public convenience and welfare will be substantially served and the appropriate use of the neighboring property will not be substantially or permanently injured, the Board may, after public notice and public hearing, and subject to appropriate conditions and safeguards, authorize special exceptions to the ordinance. Specifically, the Board may:

- 1) Permit the reconstruction, extension or enlargement of a building occupied by a non-conforming use.
- 2) Permit modification of the height, yard, area, coverage and parking regulations on land which has restricted area, shape, or slope.
- 3) Require the discontinuance of non-conforming uses of land or structure.
- 4) Hear appeals of any person aggrieved or affected by the decision of an administrative officer.

## PUBLIC HEARINGS

The Zoning Board of Adjustments and Appeals meets on the 3rd Monday of each month.

## DEADLINE

The deadline for filing an application is 12:00 noon on the Wednesday four (4) weeks prior to the applicable meeting.

## FEES

The application fee for an appeal to the Zoning Board of Adjustments and Appeals is \$100.00.

## SUBMISSION

The applicant is responsible for submitting, at the time application is made, ten copies of the plot plan and any other required information.

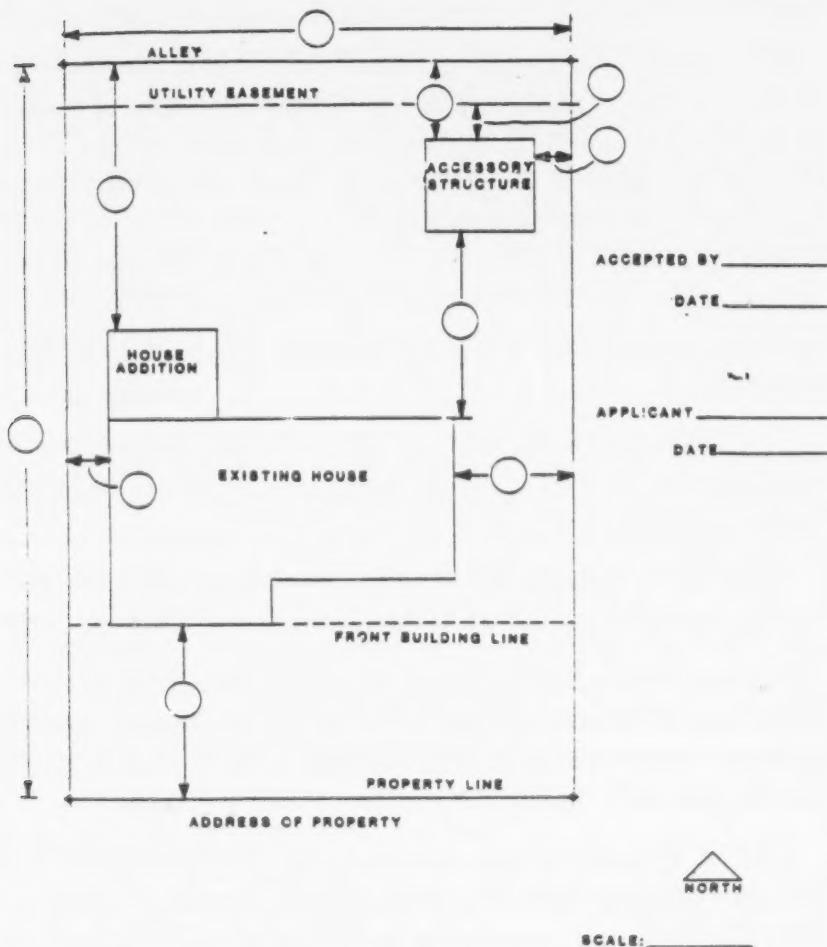
## APPLICATION PRESENTATION

At the applicable public hearing, an applicant shall have a maximum of five (5) minutes to make a formal presentation of the project proposal. Although presentation of slides at the public hearing is at the discretion of the applicant, facilities for slide projection will be available. However, the applicant shall assume full responsibility for providing a properly prepared and compatible slide carousel to staff prior to the public hearing.

Use of transparencies on an overhead projector is another effective means of material presentation. However, due to the size and arrangement of the City Council Chambers, hand-held or tripod-mounted opaque renderings generally prove to be ineffective means of presentation. The use of slides is usually the preferred means of visual aid for project presentation.

**IT IS VITALLY IMPORTANT TO YOU AS AN APPLICANT TO RETURN A FULLY COMPLETED APPLICATION PACKAGE. WITHOUT A COMPLETE APPLICATION ON FILE, THE VARIANCE REQUEST CANNOT BE PROCESSED AND WILL NOT BE PLACED ON A PUBLIC HEARING AGENDA.**

# ZONING BOARD OF ADJUSTMENTS TYPICAL DIAGRAM FOR APPEAL



A final survey should have this information and may be substituted.

**EXHIBIT "A"**

BEING all that certain lot, tract or parcel of land situated in the TAPLEY HOLLAND SURVEY, ABSTRACT NO. 750, City of Grand Prairie, Tarrant County, Texas, and being more particularly described as follows:

BEGINNING at an iron rod found for corner in the South line of West Jefferson Boulevard at the Northwest corner of a called 25 acre tract owned by E. D. Douthitt, said corner being 475 feet, Easterly as measured along the South line of said West Jefferson Boulevard from the Westerly line of said TAPLEY HOLLAND SURVEY, ABSTRACT NO. 750 and North 81 deg. 24 min. 58 sec. East, 418.65 feet from the Southeast corner of the intersection of West Jefferson Boulevard with Great Southwest Parkway;

THENCE North 81 Deg. 24 Min. 58 Sec. East, along the South Line of West Jefferson Boulevard 418.60 feet to an iron rod found for corner;

THENCE South 00 deg. 38 min. 04 sec. East, 1084.09 feet to an iron rod found for corner in the North line of Sherman Street;

THENCE North 89 deg. 28 min. 07 sec. West, along the North line of Sherman Street, 412.80 feet to an iron rod found for corner in the West line of aforementioned called 25 acre tract of land owned by E. D. Douthitt;

THENCE North 00 deg. 44 min. 22 sec. West, along the West line of said Douthitt tract, 1017.80 feet to the PLACE OF BEGINNING and containing 9.980 Acres of Land and also being known as 2515 W. Jefferson Boulevard, Grand Prairie, Texas.

**EXHIBIT "B"**

On November 27, 1985, Owner's tenant, Jose G. Gomez, made application for an alcoholic beverage license, a dance hall license and a mechanical amusement device license for 2515H W. Jefferson Blvd. in Grand Prairie (copies of the applications are attached). The City Secretary denied the applications on December 2, 1985, stating that under Section B-713 of Grand Prairie's Comprehensive Zoning Ordinance (the "Ordinance") the specific use permit on 2515H W. Jefferson had expired, and that under Section B-710 and B-711 of the Ordinance, Gomez would be unable to obtain a new specific use permit to serve alcoholic beverages because he did not operate a restaurant.

Owner appeals the decision by the City Secretary for the following reasons:

1. The City Secretary erroneously concluded that the specific use permit had expired. Owner's building at 2515 W. Jefferson has been continuously used to sell alcoholic beverages on premises in the same manner for approximately 20 years.

2. Sections B-710 and B-711 of the Zoning Ordinance are invalid because they are in violation of the Texas Alcoholic Beverage Code (the "TABC"). Section 109.31 of the TABC provides that "a City by charter may prohibit the sale of liquor in all or part of the residential sections of the City." Section 1.06 of the TABC provides:

Unless otherwise specifically provided by the terms of this Code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this Code.

Article XI, Section 5, of the Texas Constitution provides in pertinent part that:

[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State . . . .

The Ordinance prohibits the sale of alcoholic beverages for on-premise consumption except in restaurants that conform to the provisions of Sections B-710 and B-711. Owner's property is not in a residential area as provided by Section 109.31 of the TABC, but is, instead, in an area zoned commercial office. Further, Grand Prairie did not enact its prohibitions on the sale of alcoholic beverages by charter but instead did so by a zoning ordinance. The Legislature has stated in Section 1.06 that the sale of alcoholic beverages shall be governed exclusively by the provisions of the TABC. Grand Prairie's Zoning Ordinance is in violation of the TABC and the Texas Constitution.

3. Grand Prairie's Zoning Ordinance concerning on-premise consumption of alcoholic beverages is an unconstitutional taking of property and violates the Owner's rights under the Fourteenth Amendment of the United States Constitution.

In the event the Board of Adjustments finds that the City Secretary acted properly in denying the Application of Owner's tenant for the licenses, pursuant to article 1011(g)(3) of the Texas Revised Civil Statutes Annotated and the provisions of the Ordinance, Owner requests the Board of Adjustments to grant a variance and/or special exception to the Ordinance to permit Owner's tenant to obtain an alcoholic beverage license, a dance hall license and a mechanical amusement device license in accordance with his application. Owner would show that (1) such a variance and/or special exception would not be contrary to the public interest, (2) that special conditions exist in this situation

because Owner's building has been continuously used in the same manner for an extended period of time, and the use cannot be changed due to economic conditions and in view of existing leases on the building to which owner is contractually bound, and (3) that Owner and his tenant will suffer undue economical hardship if the variance and/or special exception is not granted.

City of  
Grand Prairie**MEMO & ROUTING SLIP****ROUTE TO: CLAYTON HUTCHINS**

<b>City Manager</b>	<b>Planning</b>
<b>Assistant City Mgr.</b>	<b>Police</b>
<b>City Secretary</b>	<b>Public Works</b>
<b>Finance</b>	<b>Purchasing</b>
<b>Fire</b>	<b>Tax</b>
<input checked="" type="checkbox"/> <b>City Attorney</b>	<b>Inspection</b>
<b>Parks &amp; Recreation</b>	<b>Water</b>
<b>Personnel</b>	<b>Health</b>
<b>Municipal Court</b>	<b>Library</b>

**INFORMATION**  
 **APPROVAL/SIG.**  
 **ACTION**  
 **YOUR FILES**

**SEE ME**  
 **COMMENTS/REC.**  
 **REPLY TO**  
 **AS REQUESTED**

**CENTRAL FILE**  
 **TYPING**  
 **COPIES**  
 **CIRCULATE**

**REMARKS: DOES THE ZONING BOARD OF ADJUSTMENTS HAVE JURISDICTION OVER THE CASES AT.**

- (1) 2332 NORWICH LN. YES
- (2) 3830 VERDE WOODS YES
- (3) 2515 H. W. JEFFERSON The Board has no jurisdiction RCH 1/7/86

FROM /s/ JerryDATE JAN 2/86**PRIORITY**

**Immediate**  
 **For Next Agenda**

**As Soon As Possible**

**At Your Convenience**

